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नई दिल्ली, शनिवार, अप्रैल 9, 1994/चैत्र 19, 1916

No. 14]

NEW DELHI, SATURDAY APRIL 9, 1994/CHAITRA 19, 1916

इस भाग में भिन्न प्रष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में
रखा जा सके

Separate Paging is given to this Part in order that it may be filed as a
separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii)

PART II—Section 3—Sub-section (iii)

(संघ राज्य क्षेत्र प्रशासनों के छोड़कर) केंद्रीय अधिकारियों द्वारा जारी किए गए आदेश और अधिसचनाएँ
Orders and Notifications issued by Central Authorities (other than the Administration of Union Territories)

भारत निर्वाचन आयोग

नई दिल्ली, 25 मार्च, 1994

आग्रो 34.—निर्वाचन आयोग 1991 की निर्वाचन
अर्जी सं० 8 में कर्नाटक उच्च न्यायालय के तारीख 22-12-93
के आदेश को लोक प्रतिनिधित्व अधिनियम, 1951 (1951
का 43) की धारा 106 के अनुसरण में इसके द्वारा प्रकाशित
करता है।

[संख्या 82/कर्ना- लो०स०/8/91-94]

आदेश से,
बलवन्त सिंह, सचिव

ELECTION COMMISSION OF INDIA

New Delhi, the 25th March, 1994

O.N. 34.—In pursuance of Section 106 of the
Representation of the People Act, 1951 (43 of
1951) the Election Commission hereby publishes
the order of the High Court of Karnataka dated
22-12-93 in Election petition No. 8 of 1991.

[No. 82/KT-HP/8/91-94]

By Order,
BALWANT SINGH, Secy.

IN THE HIGH COURT OF KARNATAKA AT
BANGALORE

Dated the 22nd day of December, 1993

BEFORE

THE HON'BLE MR. JUSTICE : B. JAGAN-
NATHA HEGDE
ELECTION PETITION NO. 8/1991

BETWEEN :

Siddaramaiah, S/o Late Siddaramegowda,
Aged 43 years, R/a No. 1928, 3-A Main
Road, R. P. C. Layout, Vijayanagar,
Bangalore-560040.—Petitioner.

(By Sri L. G. Havanur and Sri Ravivarma Kumar)

AND

1. Anwari Basavaraj Patil, major, R/a H.
No. 1-11-86, Nijalingappa Nagar, Raichur
Town, Raichur District.
2. Achutha Devaraya, major, R/a H. No. 16,
Neharu Co-Op. Colony, Hosapet, Bellary
District.
3. Allasab, major, R/a Ward No. 2, Block
No. 4, Gangavathi, Raichur District.

4. IJluru Gopalakrishna Shreshti, major, R/a Sri Kanikaparameshwari Vadhu Varara Anweshana Kendra, Sri Nagareshwara Temple, Mahatma Gandhi Road, Gangavathi, Raichur District.
5. D. S. Kalmath, major, advocate Sindhanoor, Raichur District.
6. H. Maradanappa, major, R/a Mochiwada, Gangavathi, Raichur District.
7. Mallappa Devappa Madar, major R/a & P. O. Mundargi, Mundargi Taluk, Dhara-wad District.
8. Ramakrishna, major, R/a Sriramanagar, Gangavathi Taluk, Raichur District.
9. Renukacharya Hiremath, major, R/a H. No. 120/B, Block No. 10, Karatagi, Gangavathi Taluk, Raichur District.
10. Shivamurthi Swamy Alawandi, major, R/a Alwandi, Koppal Taluk, Raichur District.
11. Shekarappa Yenkappa Korannavar, Major, R/a Betageri, Koppal Taluk, Raichur District.
12. Sarojadevi Deshpande, major, R/a H. No. 5-1-98 : 1, Somavarapet, Raichur.
13. Syed Mahamood, major, Retired Station Master, Near Mosque Kanchagar Pet, Bellary Road, Hosapet, Bellary District.
14. The Returning Officer, No. 4, Koppal Parliamentary Constituency, Koppal, by name K. H. Janardhana Rao, working as Vigilance & Administrative Officer, The Hutt Gold Mines Co. Ltd., Hutt, Rai-chur District—Respondents

(By Sri C. M. Basavarya and Sri M. V. Hiremath for R-1, Sri A. M. Farooq for R-2, Sri K. Vishwanath, G. P. & A. M. Farooq, HGA, for State-R-14. R-3 to R-13 placed ex parte).

Election Petition filed under Section 81 of the Representation of the People Act, 1951, by the candidate at 1991 Parliamentary Election to the Lok Sabha No. 4, Koppal Parliamentary Constituency Election held on 15-6-1991 through his Counsel Sri Ravivarmakumar praying to call for all the

ballot papers at the said election, direct the recounting of votes in the entire constituency, declare the election of R-1 from No. 4 Koppal Parliamentary Constituency at the said election as void, declare that the petitioner has been duly elected to the Lok Sabha from No. 4 Koppal Parliamentary Constituency at the General Elections 1991, and grant such other reliefs as this Hon'ble Court deems fit in the circumstances of the case including an order as to costs.

This petition having been reserved for orders, coming on for pronouncement this day, the Court pronounced the following :

ORDER

This petition is presented challenging the legality and validity of the election held at the General Elections to Lok Sabha 1991 (Tenth Lok Sabha) from No. 4 Koppal Parliamentary Constituency, Koppal. The polling was held on 15-6-1991. Counting of the votes was taken up on 16-6-1991 and the declaration of the result was made on 17-6-1991, declaring Respondent no. 1 as the successful candidate from the said constituency.

2. Material allegations necessary for the purpose of deciding this petition may be stated as follows :

The petitioner contested the election as a candidate from Janatha Dal. R-1 to R-13 also contested the said election. R-1 was nominated by the Indian National Congress while R-2 was nominated by the Bharathiya Janatha Party. R-5 contested as a candidate set up by the Karantaka Rajya Raitha Sangha. The other candidates contested the election as independent candidates. R-14 was the Returning Officer. The petitioner had appointed one Virupak-shappa Agadi, former-M.L.A., Koppal, as his election agent.

3. No. 4 Koppal constituency consists of eight assembly segments viz., Sindhanoor, Kushtagi, Yelburga, Kanakagiri, Gangavathi, Koppal, Hos-pet and Mundargi. Along with this election, a by-election to fill up a vacancy from Hospet assembly constituency was also held. The counting of votes at the said election was conducted in Sri Gavisiddesh-wara High School, Koppal. The counting com-menced at 12.00 noon on 16-6-1991. The details of the counting tables used in each room are set out as follows :

Sl. No. and name of the assembly/segment No.	Counting Room No.	No. of Tables used	Total
1. 25—Sindhanoer	27	8	15
2. 26—Kushtagi	28	7	12
3. 27—Yelburga	36	6	12
4. 28—Kanakagiri	37	6	12
5. 29—Gangavathi	25	6	13
6. 30—Koppal	26	6	13
7. 34—Hospet	31	7	14
8. 187—Mundargi	32	6	14
	34	7	15
	35	7	15
	Central Hall	15	15
	Shuttle Hall	15	15
	Library	11	11

4. Apart from the Returning Officer (R-14), there were 9 Assistant Returning Officers, one Assistant Returning Officer (Hq), and one each for each of the 8 assembly segments. At every table there was a counting supervisor assisted by two counting assistants.

5. These averments relating to the facts have not been denied in the written statement filed by the contesting first respondent.

6. It is alleged by the petitioner that the Returning Officer has wrongly declared that R-1 had secured 2,41,176 votes thereby giving a narrow margin of 11,197 votes over the petitioner. According to him, 22,243 votes were declared to be rejected and the petitioner has been assigned only 2,29,979 votes though he had secured majority of the valid votes polled. It is further alleged that R-1 was elected to the 9th Lok Sabha at the general elections held in the year 1989 on Janatha Dal ticket and because he defected to the Samajavadi Janatha Party, he was disqualified by the Speaker of the Lok Sabha under Para 2 of Schedule X of the Constitution of India. The petitioner, therefore, contends that by virtue of the said disqualification, R-1 and improper refusal of votes cast in favour of the Lok Sabha and that disqualification was in force even on the date of filing of the nomination and it continues thereafter also. The petitioner, therefore, alleges that the Returning Officer ought to have rejected the nomination paper of R-1 and he could not have accepted the same and that the election of R-1 to the 10th Lok Sabha is void and is liable to be set aside under Section 100(1)(a) of the Representation of the People Act, 1951. The result of the election declaring R-1 as the returned candidate has been materially affected by the improper acceptance of his nomination paper and the election of R-1 is liable to be declared void under Section 100(1)(d)(i) of the Representation of the People Act, 1951.

7. The petitioner further alleges that large scale illegality has taken place in the counting of votes. The result of the election in declaring R-1 as the returned candidate is materially affected by the large-scale improper counting of votes in favour of R-1 and improper refusal of votes cast in favour of the petitioner, thus vitiating the result of the election under Section 100(1)(d)(iii) of the Representation of the People Act, 1951. It is not necessary to refer to the other allegations made in the petition as they have not been pressed into service.

8. Respondent-1 has contended that his disqualification is not permanent and it would at best be for the period of 9th Lok Sabha. According to him, the Speaker has no power to disqualify a member beyond the period of the 9th Lok Sabha. He, therefore, contends that it is not correct to say that by virtue of the said disqualification order passed by the Hon'ble Speaker, he had become permanently disqualified to be a member of the Lok Sabha or that disqualification was in force even on the date of filing of the nomination paper. It is also alleged by him that the petitioner cannot now challenge the validity of the acceptance of the nomination as the

said objection was not raised at the time of scrutiny of the nomination papers. It is also his contention that no illegality has taken place in the counting of votes. He also denies that there was any improper reception of votes cast in favour of the petitioner as votes cast in favour of R-1 or improper refusal or reception of votes cast in favour of the petitioner.

9. The following issues have been framed on the basis of the pleadings :

- (1) Does the petitioner prove that Respondent-1 was disqualified to contest the election in question, because of the order passed by the Speaker of the Lok Sabha in terms of para-2 of Schedule X to the Constitution of India read with Clause 2 of Article 102 of the Constitution as alleged in the petition ? If so proved, was the acceptance of the nomination of respondent-1 by respondent-14 was invalid and therefore the election of respondent-1 is liable to be declared void under Section 100(1)(d)(i) of the Representation of the People Act, 1951 ?
- (2) Does the petitioner prove that during the course of counting of votes, large number of votes cast in favour of the petitioner have been wrongly counted as votes cast in favour of respondent-1 and there was improper rejection of votes cast in favour of the petitioner thus vitiating the result of the election as alleged by the petitioner ?
- (3) Does the petitioner prove, that contrary to the provision of Rule 55(2) of the Conduct of Election Rules, at the counting of votes of Hospet Assembly segment of the Constituency, the unsealing of the ballot box was not done at the counting tables before the agents of the petitioner but was done elsewhere as alleged in the petition ?
- (4) Does the petitioner prove that many of the ballot papers counted in favour of respondent-1, more particularly in Hospet Assembly segment of the Constituency, were stamped with marks made by a device other than the one provided at the election booths ?
- (5) Does the petitioner prove that because of the illegality alleged in the petition, the election result in question is materially affected and therefore the election of respondent-1 is liable to be declared void under Section 100(1)(d)(iv) of the Representation of the People Act, 1951 ?
- (6) Is this a fit case for ordering recounting of votes ?
- (7) In the circumstances, is the petitioner entitled to be declared elected to the Lok Sabha from No. 4 Koppal Parliamentary Constituency ?
- (8) Is the petitioner entitled to costs ?
- (9) What order ?

Two witnesses were examined on behalf of the petitioner and exhibits P-1 to P-7(a) have been marked. R-14, the Returning Officer, examined himself as R.W. 1 and exhibits R-1 to R-7 have been marked on his behalf.

10. Sri L. G. Havanur, learned senior Counsel for the petitioner, did not press issue Nos. 2, 3 and 4. Issue No. 5 has been pressed into service only on the ground that identifying of valid and invalid ballot papers out of the ballot papers kept apart as doubtful votes was made by the Assistant Returning Officers without the written authority of the Returning Officer. Therefore, issue Nos. 1, 5, 6, 7, 8 and 9 only arise for my consideration.

11. Sri Basavarya, learned Counsel for R-1 contends that the petition is not maintainable. According to him, the petitioner, in his petition, has alleged corrupt practice and when an allegation of corrupt practice is made, the petition shall have to be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof as provided under Section 83 of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act'). He further contends that the petition is liable to be dismissed by virtue of Section 80 of the Act which is mandatory. But, this contention was raised by him in I.A. No. 7 and this Court has rejected the same while disposing of I.A. No 7 by an order dated 15-4-1993. It is admitted that the S.L.P filed against the said order has been dismissed by the Hon'ble Court. The petitioner, therefore, cannot raise the same contention at this stage again.

12. Sri Anwari Basavaraj Patil (Respondent No. 1), was a member of the Ninth Lok Sabha and he was disqualified under Part-2 of the Tenth Schedule to the Constitution read with clause (2) of Article 102 of the Constitution by an order Exhibit P-1 dated 12-1-1991 of the Hon'ble Speaker of the Lok Sabha. According to the petitioner, R-1 was permanently disqualified to be a member of the Lok Sabha and since the said disqualification was in force on the date of filing of the nomination, his nomination paper should not have been accepted, and the election of R-1 to the Tenth Lok Sabha is void and is liable to be set aside. R-1, while not disputing that he was disqualified from being a member of the Ninth Lok Sabha by virtue of the notification, exhibit P-1, contends that he was disqualified from being a member of the Ninth Lok Sabha only, that he lost only the then existing membership and that he is not disqualified from being chosen as a member of the Parliament afresh.

13. The relevant portion of exhibit P-1 reads thus:

ORDER

2. In exercise of powers conferred upon me under Paragraph 6 of the Tenth Schedule to the Constitution of India and the Rules thereunder, I, Rabi Ray, Speaker, Lok Sabha, hereby declare that the following 7 members of Lok Sabha have incurred disqualification for being Members of

Lok Sabha in terms of Paragraph 2(1)(b) of the said Schedule :—

1. Shri Basavraj Patil
2. ***
3. ***
4. ***
5. ***
6. ***
7. ***

Accordingly, the aforesaid Members have ceased to be Members of Lok Sabha with immediate effect, and their seats shall thereupon fall vacant.

3. In exercise of powers conferred upon me under Paragraph 6 of the Tenth Schedule of the Constitution of India and the Rules thereunder, I, Rabi Ray, Speaker, Lok Sabha, hereby declare that Dr. Shakeelur Rehman, Member, Lok Sabha has incurred disqualification for being a Member of Lok Sabha in terms of Paragraph 2(1)(a) of the said Schedule. Accordingly, Dr. Shakeelur Rehman has ceased to be a Member of Lok Sabha with immediate effect, and his seat shall thereupon fall vacant.

New Delhi, PABUL RAY, Speaker
Dated : 11 January, 1991 Lok Sabha

K. C. RASTOGI, Secretary-General"

14. Sri Havanur, learned Senior Advocate for the petitioner, contends that the disqualification is penal and akin to conviction, that the Tenth Schedule has not prescribed any period of disqualification, and that it should be taken as permanent as it has not been clearly stated that the disqualification applies only to the existing seat. It is also his contention that in view of the decision rendered in the case of KIHOTA HOLLOHON Vs. ZACHILHU (A.I.R. 1993 S.C. 412), that the Tenth Schedule is a law made by the Parliament in exercise of its ordinary legislative power and not by the exercise of its constituent power, Article 102(1)(e) is attracted. It is his further contention that if Article 102 (1)(e) of the Constitution of India is attracted, R-1 will be disqualified for being chosen as and for being a member of the Parliament as provided under Article 102(1).

15. Article 102 of the Constitution of India reads thus :

"102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament —

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;

- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

Explanation :—For the purpose of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

The relevant portion of Part-2 of the Tenth Schedule of the Constitution with which we are concerned, dealing with the provisions of the disqualification on the ground of defection reads thus :

"2. DISQUALIFICATION ON GROUND OF DEFLECTION—(1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House —

- (a) if he has voluntarily given up his membership of such political party; or
- (b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation :— * * * * *

16. According to Sri Havanur, the object of disqualifying a person who had defected is to punish him severely and if such a person is permitted to contest again in a by-election held for the same seat which has become vacant by reason of his disqualification or if the same person is permitted to contest again in another election to enter the House again, it will be indirectly condoning the serious crime committed by him and such an interpretation cannot be given to the provisions contained in Article 102 and the Tenth Schedule Sri Havanur further points out that the legislature wanted to punish a defector for his undesirable and immoral act of defection by permanently disqualifying him to become a member of the House again from which he was ousted. There is some force in the contention of Sri Havanur that the disease of defection in some cases is very undesir-

able. The Supreme Court in the case of KIHOTA HOLLOHON Vs. ZACHILHU (A.I.R. 1993 S.C. 412), has observed that the provisions in paragraph-2(1)(a) of the Tenth Schedule proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his membership of the legislature and go back before the electorate. Paragraph-13 of the said decision reads thus :

"13. In considering the validity of a constitutional amendment the changing and the changed circumstances that compelled the amendment are important criteria. The observations of the U.S. Supreme Court in Maxwell Vs. Dow, (1899) 44 Lawyer's Edition 597 at page 605 are worthy of note :

"....to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted..."

The Report of the Committee on Defections took note of the unprincipled and unethical defections induced by considerations of personal gains said :

"....What was most heartening was the feeling of deep concern over these unhealthy developments in national life on the part of the leaders of political parties themselves. Parliament mirrored this widespread concern...." (page 1)"

The Supreme Court in the said judgement also refers to report dated 1-7-1969 of the Committee on Defections which has observed that the lure of office played a dominant part in the decisions of legislators to defect. The object, therefore, of introducing the Tenth Schedule in the Constitution is undoubtedly to prevent the political defections, motivated by undesirable considerations. But, a person can be disqualified permanently only if the legislature has said so. The measure and extent of punishment cannot be fixed by the Court as the Court cannot introduce its own philosophy to determine the quantum of punishment. When the language of the statutory provisions are clear, it is the duty of the Court to give effect to it without taking into account the other considerations to ascertain the intention of the legislature, as pointed out in the case of THE COMMISSIONER OF INCOME-TAX, MADRAS Vs. THE AJAX PRODUCTS LTD. (A.I.R. 1965 S.C. 1358).

17. No doubt, Article 102(1) says that a person shall be disqualified for being chosen and for being a member of either House of Parliament, if he comes within clauses (a)(b)(c) and (d). But Article 102(1)(e) specifically says that he shall be disqualified for being chosen as and for being a member of either Houses of the Parliament if he is

so disqualified under any law made by the Parliament. Article 102(1) provides two modes of disqualifications. The first mode is disqualification for being chosen as a member and the second mode is for being a member. The provisions will have to be read disjunctively. A person can be disqualified for being a member of the House without being disqualified for being chosen as a member of the House. Article 102(2) only says that a person is disqualified for being a member of the House if he is disqualified under the Tenth Schedule. Part-2 of the Tenth Schedule also employs the same phraseology.

18. The meaning assigned to the word 'being' in the Chambers Dictionary—New Edition, is

being=existence; ***; any person or thing existing.

19. It is a well established canon of construction that the Court should read the Section, as it is and cannot re-write to suit its convenience nor does any canon of construction permit the Court to read the Section in such manner as to render it to some extent otiose as pointed out in the case of A.R. ANTULY Vs. R.S. NAYAK (A.I.R. 1984 S.C. 718). Further, the Courts cannot take into account the concepts of common law or equity to determine what should be quantum of punishment for defection. In this context, it is useful to refer to the following passage in the case of JYOTI BASU Vs. DEBI GHOSAL (A.I.R. 1982 S.C. 983) :

"8. A right to elect, fundamental though it is to democracy, is, anomalously though, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So, is the right to be elected. So is the right to dispute an election. Outside the statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight packet....".

I am, therefore, of the view that neither Article 102 nor the Tenth Schedule of the Constitution provides for a permanent disqualification for being chosen as a member for a person who is disqualified for being a member under the Tenth Schedule of the Constitution.

20. In that view of the matter, acceptance of nomination of R-1 and his subsequent election are not illegal. Issue No. 1 is, therefore, answered against the petitioner.

21. The further case of the petitioner is that the election of R-1 is liable to be declared void, as the eight Assistant Returning Officers, have decided the validity of doubtful votes and rejected 22,243 votes. In this process, they have also accepted some ballot papers as valid votes out of the doubtful ballot papers and since the margin between the petitioner and R-1 is only 11,197 votes, declaration of R-1 as successful candidate is void in law.

22. It is not in dispute that eight Assistant Returning Officers who were in charge of eight assembly segments have categorised which are valid and invalid votes among the doubtful votes kept apart, that the Assistant Returning Officers have signed part-II of Form-16 prepared for each of the eight assembly segments and that the Returning Officer has not made any endorsement on the rejected ballot papers. According to Sri L. G. Havanur, learned senior Counsel for the petitioner, these acts of the Assistant Returning Officer are in clear violation of Rule 56 of the Conduct of Election Rules, 1961. It is also his contention that the Assistant Returning Officers were not authorised to perform these acts without specific written delegation from the Returning Officer as required under Section 22 of the Act. It is also not in dispute that the Assistant Returning Officers had no written authority to carry out the acts now complained.

23. Rule 56(2) of the Conduct of Election Rules, 1961, authorises the Returning Officer to reject a ballot paper under certain circumstances. He is also required to allow each counting agent present an opportunity to inspect the ballot papers under sub-rule (3) of Rule 56. Sub-rule (4) of Rule 56 says that the Returning Officer shall endorse on every ballot paper which he rejects, the word "rejected" and the grounds of rejection in abbreviated form either in his own hand or by means of a rubber stamp and shall also initial such endorsement. Sub-rule (7) of Rule 56 says that after the counting of all ballot papers has been completed, the results of counting in Form-16 will have to be signed by the Returning Officer. It is true that all these duties have been assigned to the Returning Officer and in the instant case, all these steps have been taken by the Assistant Returning Officers without any written authority from the Returning Officer.

24. The contention of Sri Havanur that the Assistant Returning Officers required written authority to perform these functions from the Returning Officer has been disputed by Sri Basavarya learned Counsel for R-1, who has been declared as successful candidate, and also the learned Government Advocate, who is appearing for R-14, the Returning Officer. According to them, no written delegation or authority of the Returning Officer in favour of the Assistant Returning Officers is necessary having regard to the phraseology of Sections 22 and 23 of the Act, which read thus :

"22. ASSISTANT RETURNING OFFICERS.—"

(1) The Election Commission may appoint one or more persons to assist any returning officer in the performance of his functions :

Provided that every such person shall be an officer of Government or of a local authority.

(2) Every assistant returning officer shall, subject to the control of the returning officer, be competent to perform all or any of the functions of the returning officer :

Provided that no assistant returning shall perform any of the functions of the returning officer which relate to the scrutiny of nominations unless the returning officer is unavoidably prevented from performing the said function.

23. RETURNING OFFICER TO INCLUDE ASSISTANT RETURNING OFFICERS PERFORMING THE FUNCTIONS OF THE RETURNING OFFICER.— References in this Act to the returning officer shall, unless the context otherwise requires, be deemed to include an assistant returning officer performing any function which he is authorised to perform under sub-section (2) of Section 22."

25. According to the contesting respondents, Section 23 enables the Assistant Returning Officers to perform all or any functions of the Returning Officer subject to the control of the Returning Officer. It is also their contention that the said provisions do not stipulate that the Assistant Returning Officers can perform the functions of the Returning Officers only if they are permitted to do so by the Returning Officer in writing.

26. Sri Havanur, on behalf of the petitioner, contends that the phraseology employed in Section 22 of the Act is similar to Section 19-A of the Act and in order to interpret Section 22, Section 19 A and the marginal note thereto could be referred to as an aid. Section 19-A and the marginal note thereto read thus :

"19A. DELEGATION OF FUNCTIONS OF ELECTION COMMISSION.— The functions of the Election Commission under the Constitution, the Representation of the People Act, 1950 (43 of 1950) and this Act or under the rules made thereunder may, subject to such general or special directions, if any, as may be given by the Election Commission in this behalf, be performed also by a Deputy Election Commissioner or by the Secretary to the Election Commission."

The contention of Sri Havanur is that under Section 19-A, the Deputy Election Commissioner or the Secretary to the Election Commission can perform the functions of the Election Commission only if authorised to do so in writing, and that any other

meaning would be in violation of Article 324 of the Constitution of India, which vests in the Election Commissioner the power of superintendence, direction and control of elections. According to Sri Havanur, the Parliament, by enacting Section 19-A of the Act, could not have conferred any power of the Election Commission on the Deputy Commissioner or its Secretary and that could be done only by a written delegation.

27. Sri Basavarya, learned Counsel for R-1, relying on a decision in the case of KANHIYA LAL OMAR Vs. R. K. TRIVEDI (A.I.R. 1986 S.C. 111), contends that the general powers of superintendence, direction and control of election vested in the Commission under Article 324(1) are subject to any law made either under Article 327 or under Article 328 of the Constitution and that it cannot be assumed that the Parliament has taken away any powers of the Commission by enacting Section 19-A of the Act. It is also his contention that since the language of Section 22 and 23 are very clear, it is not necessary to refer to the other provisions of the Act in the same part. It is further contended by him that if really the Parliament intended that the Assistant Returning Officers could perform the function of the Returning Officer only upon a written delegation, they could have clearly stated so as has been done in Section 26(2) or Section 26(3) of the Act found in the same part-IV of the Act, dealing with administrative machinery for the conduct of election. Since 26(2) stipulates that a polling officer shall, if so directed by the presiding officer, perform all or any of the functions of a presiding officer under this Act or any rules or orders made thereunder. Section 26(3) provides that if the presiding officer, owing to illness or other unavoidable cause, is obliged to absent himself from the polling station, his functions shall be performed by such polling officer as has been previously authorised by the direct election officer to perform such functions during any such absence.

28. The function of a Court is to ascertain what the Legislature meant. Only if the language of the provisions is doubtful, it is permissible to call in aid outside consideration to ascertain the intentions of the Legislature. I do not think that the phraseology employed in Section 19-A of the Act would in any way help in interpreting Section 22 or Section 23. Section 22(2) of the Act states that the Assistant Returning Officers are competent to perform all or any of the functions of the Returning Officer subject to his control. The Returning Officer, therefore, has power to check, restrain or supervise the functions of the Assistant Returning Officers and this would not import the concept of a written delegation. Since the Assistant Returning Officers derive their powers by virtue of Section 22 itself, no written delegation is necessary to perform such functions.

29. The proviso to sub-section (2) of Section 22 of the Act before its amendment by Act No. 27 of 1956 reads thus :

"Provided that no assistant returning officer shall perform any of the functions of the returning officer which relate to the acceptance of a nomination paper or to the scrutiny of

nominations or to the counting of votes unless the returning officer is unavoidably prevented from performing the said function."

After the amendment, the proviso reads thus:-

"Provided that no assistant returning officer shall perform any of the functions of the returning officer which relate to the scrutiny of nominations unless the returning officer is unavoidably prevented from performing the said function."

Before the amendment, the Assistant Returning Officers were prohibited from accepting nomination papers, scrutinizing the nomination and counting of votes, unless the Returning Officer is unavoidably prevented from performing the said functions. After the amendment, this prohibition is limited only to scrutiny of nominations. It cannot be, therefore, said that even for counting, a written authority from the Returning Officer is necessary. It will have to be remembered that in the instant case, the acts attributed as unauthorised, relate to the counting of votes.

30. Sri Basavarya, learned Counsel for R-1, relying on a decision of the Division Bench of this Court in the case of H. NAGAPPA Vs. G. VENKATESHWARAN (1964(2) Mysore Law Journal 51), points out that sub-section (2) of Section 22 of the Act permits every Assistant Returning Officer to perform all or any of the functions of the Returning Officer. The passage relied upon by him reads thus:

"The last two grounds urged by Sri O. Veerabasappa, can be disposed of first. No ground was raised in the petition that the Assistant Returning Officer had no power to reject the votes on the ground of invalidity. It is entirely a new ground which has been raised for the first time in appeal. Sub-section (2) of Section 22 of the Act, states "Every Assistant Returning Officer shall, subject to the control of the Returning Officer, be competent to perform all or any of the functions of the Returning Officer". We see absolutely no substance in the argument of learned Counsel that the Assistant Returning Officer had no power to reject the votes."

Sri Havanur points out that this observation is not binding, that it is only a passing observation and that no finding was given on the question whether an Assistant Returning Officer could have performed the functions of the Returning Officer. According to

him, no ground was raised in the petition that the Assistant Returning Officer had no power to reject the votes on the ground of invalidity. Sri Havanur further contends that if a passing reference is made there being no need to decide a question, such reference is not binding. This legal proposition of Sri Havanur will have to be accepted. But, it cannot be said that the Division Bench has made a passing reference. It is true that no ground had been raised in the said petition that the Assistant Returning Officers had no power to reject the votes on the ground of invalidity. However, the Division Bench considered the said new ground which had been raised for the first time in appeal, evidently because it was a question of law, and rejected the said contention. If the Division Bench had accepted the interpretation put forth by the appellant in the said case, they would have allowed the appeal. Therefore, it cannot be said that the observation relied upon by Sri Basavarya, learned Counsel for P-1 in Nagappa's case is a passing reference and that it is not binding. In any view of the case, an observation even if it amounts to obiter dictum, such observation must be treated with respect as laid down in the case of DHANUKDHARI PRASHAD PANDEY Vs. RAMADHIKARI MISSIR (A.I.R. 1933 Patna 81).

31. Sri Havanur, learned senior Counsel for the petitioner, has also contended that there is a possibility of rendering more than one decision, contrary to one another, resulting in total confusion, if all the Assistant Returning Officers are to carry out any of the functions of the Returning Officer. But, Section 22 specifically says that the Assistant Returning Officers can function only subject to the control of the Returning Officer. This would enable the Returning Officer to correct the errors if any committed by the Assistant Returning Officers. The Court cannot proceed on the assumption that the Legislature has made a mistake and even if there is a defect, it is not for the Court to add anything on its own to the statute and it is the duty of the Court to give effect to the language of the Section when it is clear, without calling in aid outside consideration to ascertain what the Legislature meant. Therefore, my answer to Issue No. 5 is against the petitioner.

32. In view of my findings on Issue Nos. 1 and 5, Issue Nos. 6, 7 and 8 are answered against the petitioner.

33. In the result, Election Petition is dismissed with costs of the first respondent and the fourteenth respondent. Remaining respondents are directed to bear their own costs. Advocate's fee for respondent No. 1 and respondent No. 14 is fixed at Rs. 1,000 each.